In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1190

JOHN NUCCIO, ROSARIO LUPO AND WILLIAM CURCURATO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1967. A joint petition for rehearing was denied on January 25, 1967. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including March 25, 1967, and the petition was filed on March 24, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

260-904—67

QUESTION PRESENTED

Whether the Court properly instructed the jury concerning the process by which they were to make a finding as to whether each petitioner knowingly participated in the alleged conspiracy.

STATEMENT

On May 2, 1966, petitioners were convicted by a jury in the United States District Court for the Eastern District of New York on a single-count indictment charging conspiracy to import heroin into the United States, in violation of 21 U.S.C. 174 (App. App. 7a–8a, 54a).[1] Petitioner Nuccio was sentenced to imprisonment for fifteen years and fined $10,000; petitioner Lupo to fifteen years and $5,000; and petitioner Curcurato to twelve years and $1,000 (R. 579). The court of appeals affirmed (Pet. App. A14–A15; App. App. 68a–79a).

1. The evidence at trial showed that on January 29, 1965, one Georges Henrypierre, an airline steward for Air France, was arrested at Kennedy International Airport for importing into the United States a quantity of heroin secreted in his luggage (R. 34–41, 44–45, 98, 423; Exh. 2, 3). He was to deliver this package of heroin (3.004 kilograms, 92% pure) to petitioner

[1] The record filed with the clerk of this Court includes appellants' appendix below (App. App.) and the trial transcript (R.). The trial transcript is made up of eleven separate volumes, of which volumes 1–7 and 10–11 have been paginated consecutively pages 1–579. Later, it was determined that volume 8 (relating to April 28, 1966), which pertains to instruction requests, was also pertinent to the appeal; therefore, that volume has been incorporated into the transcript at page 525, as pages 525a–525z, etc.

Curcurato at his apartment in Queens, New York (R. 46–47, 179–180, 416–417).

Henrypierre had been transporting narcotics from Paris, France to New York from the Spring of 1963 to the time of his arrest in January 1965. He was given the packages by one Henri LaPorterie in Paris (R. 39–41, 52, 63–66a; Exh. 3) with instructions to deliver them to certain addresses in Queens and in Brooklyn, and to contact petitioner Nuccio, by calling a New Jersey telephone number, to arrange for payment for the narcotics (R. 79–81). Henrypierre was paid $400 for each kilo of narcotics he delivered for LaPorterie (R. 89).

Henrypierre first met Curcurato in the Spring of 1963 at the latter's apartment on 45th Street in Queens (R. 48–54, 173), to which he had a key given to him by LaPorterie in Paris (R. 55). On several occasions, petitioner Curcurato was at the apartment and delivery of the narcotics was made directly to him (R. 53). In the fall of 1964, petitioner Curcurato informed Henrypierre that there would be a change of apartments and gave him keys for a new apartment on 58th Street, also in Queens (R. 56–58, 243). Henrypierre made some three or four deliveries of narcotics to the new apartment before his arrest in January 1965 (R. 58–62). On two occasions in 1963, petitioner Curcurato gave Henrypierre money to deliver to Paris (R. 89–90).

Other deliveries of narcotics—some three or four between 1963 and 1965—were made by Henrypierre to 680 81st Street, in Brooklyn (R. 67–70, 72). On the first such delivery, the narcotics were left with petitioner Lupo at this address (R. 69–73). On a

subsequent occasion, Henrypierre was met outside by petitioner Lupo. They drove off and picked up petitioner Nuccio. Both Lupo and Nuccio inquired about LaPorterie, and Henrypierre left the narcotics in the automobile with the two petitioners (R. 73–78).

Payment for the narcotics delivered to Queens and Brooklyn was generally accomplished independently of delivery, by reaching petitioner Nuccio through the New Jersey telephone number (R. 79–82). During 1963 and 1964, Henrypierre called this number some fifteen or twenty times, talked to a woman there, and met petitioner Nuccio by appointment in front of the C.B.S. building on Seventh Avenue in Manhattan (R. 82–85, 324–335). At each of these fifteen or twenty meetings, petitioner Nuccio gave Henrypierre a package of money varying in amounts from $20,000 to $70,000, which Henrypierre later delivered to LaPorterie in Paris (R. 85–90, 335–342, 426). On occasion, petitioner Nuccio would inquire about LaPorterie in Paris and question Henrypierre as to whether he had been out to Brooklyn or Queens (R. 86–87).

Shortly after Henrypierre's arrest in January 1965, the Queens and Brooklyn apartments were vacated by petitioners Curcurato and Lupo, respectively (R. 204–205, 391–392).

2. Petitioners and the government, in varying language, requested the trial judge to instruct the jury that it must find from independent proof that each defendant had been a member of the conspiracy before considering hearsay declarations of alleged co-conspirators against him (R. 525n, 525s, 602–603,

631–635). The judge indicated that he would cover the substance of these requested (R. 517, 525b–525c), but did not do so; instead, he gave the instructions set out in the petition for a writ of certiorari (Pet. 10–12).[2] After the major portion of the instructions were given, including the part concerning proof of a conspiracy, the judge excused the jury and called a recess "for the purpose of giving [counsel] an opportunity to direct my attention to any instruction which you think I overlooked, particularly those which I indicated I would grant and overlooked. * * * [Y]ou are at liberty to take the exceptions now. More importantly to tell me what you think I may have overlooked, which I indicated I would grant" (R. 549–550). Counsel did not bring to the judge's attention any omissions in the charge relevant to the instruction complained of here.

ARGUMENT

Petitioners' sole contention is that the trial judge committed reversible error in not expressly instructing the jurors that, before considering hearsay declarations of other conspirators against a particular defendant, they must determine from independent proof of such defendant's own acts or declarations that he

[2] Petitioners' quotation does not include the following part of the charge (R. 548–549):

> A little while ago I said to you that while you are considering a particular defendant—and that brings to mind the fact that there are three defendants here, each of whom must be treated separately in your deliberations—you take each defendant in turn as you see fit; consider all of the evidence in the case and make your determination as to his guilt or innocence.

had in fact become a member of the alleged conspiracy (Pet. 2–3, 12–16, 22–29). Such an instruction is commonly given in conspiracy cases, although decisions have held that the adequacy of the proof *aliunde* to connect individual defendants to the conspiracy is for the trial judge and that, if he is satisfied, he should leave the declarations to the jury to consider like any other evidence, instead of instructing the jury first to find by independent evidence that a particular defendant was a member of the conspiracy. See, *e.g.*, *United States* v. *Stadter*, 336 F. 2d 326, 329 (C.A. 2), certiorari denied, 380 U.S. 945; *Carbo* v. *United States*, 314 F. 2d 718, 735–738 (C.A. 9), certiorari denied, 377 U.S. 953. However, it is not, in our view, necessary to go that far to uphold the convictions in this case.

Whatever the rule in a case where hearsay declarations by co-conspirators are an important part of the proof as to a particular defendant, such is not the situation here. As the court below pointed out, the testimony in this case of what Henrypierre did in making the various deliveries—meeting the defendants, collecting money, etc.—were acts illuminating the nature of the conspiracy and as such admissible against all the defendants. *Lutwak* v. *United States*, 344 U.S. 604, 617–619. That was the major part of the proof in this case. Moreover, declarations which were an essential part of the acts proved, such as Nuccio's question as to whether Henrypierre had been in Brooklyn or Queens at the time he paid for narcotics (R. 86–87), were admissible against all defend-

ants as verbal acts[3] showing the nature of the conspiracy. To the extent that there were any declarations at all by one conspirator which could be said to be hearsay and which might have been considered against the others without independent proof of the conspiracy—possibly, for example, Nuccio's statement of regards to LaPorterie—they were so minimal as to be insignificant. In the circumstances of this case—where almost all the evidence, including the declarations which constituted verbal acts, were properly admissible in showing the nature of the conspiracy—the common instruction as to the necessity of proof *aluinde* would have been meaningless and might well have been confusing. It would serve no purpose to tell a jury that it could consider all the acts and declarations against all defendants in determining the nature of the conspiracy, but that it could not consider the same declarations against non-declarants until it found the non-declarant to be a member of the conspiracy. Here the proof abundantly showed independent acts—not declarations—by each

[3] Contrary to petitioners' assertion (Pet. 17–22), there is nothing novel about the concept of "verbal acts". A verbal act is an utterance made contemporaneously with a non-verbal act (such as delivery of money), evidence as to which is independently admissible, which throws light on the non-verbal act. See *Beaver* v. *Taylor*, 1 Wall. 637, 642; *United States* v. *Costello*, 352 F. 2d 848, 854 (C.A. 2), certiorari granted on a different issue, 383 U.S. 942; *United States* v. *Markis*, 352 F. 2d 860, 863–864 (C.A. 2), petition for certiorari pending, No. 43, 1966 Term; *United States* v. *Ross*, 321 F. 2d 61, 68–69 (C.A. 2), certiorari denied, 375 U.S. 894; *Wilson* v. *United States*, 313 F. 2d 317, 318 (C.A. 9), certiorari denied, 374 U.S. 848; *United States* v. *Annunziato*, 293 F. 2d 373, 376–377 (C.A. 2), certiorari denied, 368 U.S. 919; *Aikens* v. *United States*, 282 F. 2d 53, 57 (C.A. 10).

petitioner manifesting both the nature of the conspiracy and the connection of each petitioner thereto. Thus, no prejudice whatever resulted, and there is no occasion for further review.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

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